84207-8

No. 39517-7-II

SUPREME COURT
OF THE STATE OF WASHINGTON

FLIGHT OPTIONS LLC,

Petitioner,

v.

WASHINGTON DEPARTMENT OF REVENUE,

Respondent.

PETITION FOR REVIEW

Scott Edwards, WSBA #26455
Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
(206) 359-8000

Attorneys for Petitioner,
Flight Options LLC

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I. IDENTITY OF THE PETITIONER

Petitioner Flight Options LLC ("Flight Options") respectfully requests that the Supreme Court accept review of the Court of Appeals' published decision terminating review in this case.

II. DECISION TO BE REVIEWED

Flight Options seeks review of the decision of the Court of Appeals, Division II, __ Wn. App. __, __ P.3d __ (2010) filed January 12, 2010. A copy of the opinion is set forth in the Appendix.

III. ISSUES PRESENTED FOR REVIEW

1. Whether property taxes may be assessed without regard to ownership, contrary to the unambiguous statutory mandate that "***all*** personal property" subject to tax in Washington shall be assessed "with reference to its ... ***ownership***," RCW 84.40.020 (emphasis added), and contrary to this Court's holding that property taxes are imposed on "the ownership of property." *Covell v. City of Seattle*, 127 Wn.2d 874, 890, 905 P.2 324 (1995).

2. Whether property taxes may be assessed on mobile property that enters Washington only ***temporarily***, on an irregular and unscheduled basis, contrary to the requirement that personal property be taxed at its situs (RCW 84.44.010; *U.S. Whaling Co. v. King County*, 96 Wn. 434, 436, 165 P. 70 (1917)), contrary to this Court's decisions that a Washington tax situs requires a ***permanent***

presence in the state (*Guinness v. King County*, 32 Wn.2d 503, 507, 202 P.2d 737 (1949); *Canadian Pacific Railway Company v. King County*, 90 Wn. 38, 144 P. 416 (1916)), and contrary to U.S. Supreme Court decisions under the Due Process Clause.

3. Whether Division II's ruling that Flight Options meets the statutory definition of "airplane company" simply because Flight Options manages private jets on behalf of the jets' fractional owners fails to give meaning to the statutory requirement that an "airplane company" must be "engaged in the business of transporting persons and/or property for compensation" in conflict with this Court's recent decision in *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 210 P.3d 297 (2009).

4. Whether any ambiguities in (a) the statutory requirement that ***all*** personal property shall be assessed with reference to its ownership, (b) statutory tax situs requirements, or (c) the statutory definition of "airplane company" must be construed in favor of the taxpayer and against the Department.

IV. STATEMENT OF THE CASE

A. Flight Options' business.

Flight Options is a leading seller of fractional ownership interests in private corporate jets. CP 33. Flight Options is a Delaware limited liability company with its headquarters and principal place of business in Richmond Heights, Ohio. *Id.* It does

not maintain an office, place of business, or operations in Washington. CP 35.

Flight Options purchases jets that it re-sells to private owners in fractional shares. CP 34; *see also* CP 129-44 (Flight Options Purchase Agreement). The buyers acquire title and an undivided ownership interest in a specific aircraft that is registered with the Federal Aviation Administration. CP 34. Each fractionally-owned jet has between two and sixteen owners. *Id.* Pursuant to a separate agreement, Flight Options also provides management services to the owners for a fee. CP 34-5; *see also* CP 146-65, 167-87 (2004 and 2005 Flight Options Management Agreements).

The fractionally-owned jets managed by Flight Options do not fly on fixed routes or regular schedules. CP 35. Rather, the fractional owners use their aircraft to fly at-will between airfields throughout the United States and internationally. *Id.* None of the jets are hangared in Washington. *Id.* When a private jet managed by Flight Options enters Washington, it does so only temporarily on an irregular and unscheduled basis at the direction of a fractional owner.[1] *Id.*

[1] A small percentage of flights are made by members of Jet Pass, a private membership program that provides access to private jets without ownership. *Id.*.

B. The Department's assessments.

On June 8, 2005, the Department of Revenue ("Department") emailed Flight Options an "Airplane Company Annual Report" and instructed Flight Options to file it before June 30, 2005, "to avoid a default assessment and 25% penalty." CP 715. When demanding that Flight Options submit the report, the Department instructed Flight Options to list "all aircraft in the fractional program . . . under the 'owned' category." *Id.* To avoid the threatened penalty, Flight Options provided the information demanded by the Department. CP 36. *2005 was the first year that the Department assessed property taxes against Flight Options or any other manager of fractional ownership interests in private jets.*

Flight Options challenged the Department's authority to assess property tax against Flight Options for its management of fractionally-owned private jets that enter Washington only temporarily, on an irregular and unscheduled basis, by filing this suit for declaratory and injunctive relief on January 6, 2006, in Thurston County Superior Court. After the Department issued an assessment for 2006, Flight Options amended the complaint to include that assessment as well. CP 4. On cross-motions for summary judgment, the Superior Court dismissed Flight Options' claims. CP 743. Flight Options timely appealed.

C. Division II's opinion.

On January 12, 2010, Division II issued a five page published opinion summarily affirming the dismissal of Flight Options' Amended Complaint. Division II's opinion failed to address Flight Options' argument that the assessment violates RCW 84.40.020's express requirement that "***all*** personal property" shall be assessed "with reference to its ... ***ownership***" (emphasis added). App. Br. at 6-7; Reply Br. at 7-8.

Ignoring the existence of RCW 84.40.020, Division II confined its analysis to Ch. 84.12 RCW, which addresses the valuation of public utility property. The opinion acknowledged that RCW 84.12.210 "appears to support Flight Option's argument." Appx. 4a. That statute provides that "operating property used but not owned by" a public utility shall be assessed "to the owning company." The opinion then dismissed RCW 84.12.210 on the theory that it "***conflicts with*** the statutory definition of operating property." Appx. 4a. The perceived conflict is non-existent. Consistent with the broader scope of RCW 84.40.020, RCW 84.12.210 simply provides that utility "operating property" is assessed "to the owning company" regardless of who uses the property. Moreover, the requirement of RCW 84.40.020 that "***all*** property" must be assessed "with reference to its ... ***ownership***" is entirely unconcerned with whether or not the taxed property is "operating property."

Division II's opinion also ignored Flight Options' arguments that under Washington law (1) property taxes may only be assessed on property with a tax situs in Washington and (2) a Washington tax situs requires a permanent presence in the state. App. Br. at 9-13; Reply Br. at 2-3.

Instead, the published opinion conclusorily asserts that the assessment "is constitutional under both the Commerce Clause and the Due Process Clause." Appx. 5a. However, as the U.S. Supreme Court has admonished, the "bare question" whether property "has tax situs in a state for the purpose of subjection to a property tax is one of due process" not the Commerce Clause. *Braniff Airways, Inc. v. Nebraska State Bd. of Equalization*, 347 U.S. 590, 599, 74 S. Ct. 757, 98 L. Ed. 967 (1954). In its one sentence dismissal of this significant legal issue, the opinion failed to address either (1) tax situs requirements of Washington law or (2) constitutional Due Process limitations on the tax situs of mobile property only temporarily present in a state on an irregular, unscheduled basis.

Division II's published opinion also ignored Flight Options' argument that the basic tenets of Washington property tax law – assessing property with reference to its ownership and taxing property at its tax situs – apply regardless of whether Flight Options is a public utility subject to central valuation of its owned operating property. App. Br. at 8, Reply Br. at 13-14.

Instead the opinion merely concludes that Flight Options is a public utility because Ch. 84.12 RCW "defines an airplane company as a public utility for property taxation purposes." Appx. 4a. Yet the opinion fails to analyze whether Flight Options meets the statutory definition of "airplane company" and ignores Flight Options' argument that it is not "engaged in the business of transporting persons and/or property for compensation" as expressly required by RCW 84.12.200(3) . App. Br. at 19-21; Reply Br. at 11-12.

V. ARGUMENT IN SUPPORT OF REVIEW

This case is a case of first impression nationally. The assessments at issue here are, as far as the parties are aware, the first time any state has assessed property tax against a manager of fractionally owned private jets.[2] These novel assessments involve significant questions of Washington law. Division II's published opinion conflicts with both controlling Washington statutes and this Court's decisions on basic principles of property tax law. Moreover, the result upheld by Division II's published opinion is unconstitutional. Thus, as discussed in more detail below,

[2] Research has not discovered any cases addressing the assessment of property taxes on sellers or managers of fractional ownership interests in private jets. In 2007, apparently inspired by the Department's actions here while recognizing there was no statutory basis for assessing property taxes against managers of fractionally owned private jets, California enacted a statute expressly authorizing "fractionally owned aircraft that has a situs in" California to be assessed "to the manager." 2007 Cal. Stat. ch. 180 § 4. Several cases have been filed challenging that unique statute.

Supreme Court review of this case is appropriate under. RAP 13.4(b) (1), (3), and (4).

A. Division II's opinion ignores the plain language of RCW 84.40.020 and conflicts with decisions of this Court holding that property taxes are imposed on the ownership of property.

This Court has explained that property taxes are imposed on "the ownership of property," such that liability arises from the taxpayers' "status as property owners." *Covell v. City of Seattle*, 127 Wn.2d 874, 890, 905 P.2d 324 (1995). That defining characteristic is codified in RCW 84.40.020, which expressly requires that "***all*** personal property" subject to tax in Washington shall be assessed "with reference to its ... ***ownership***" (emphasis added). Construing RCW 84.40.020, Washington Courts have held "[o]wnership and not possession is taxable." *Star Iron & Steel Co. v. Pierce County,* 5 Wn. App. 515, 525, 488 P.2d 782 (1971) *aff'd per curiam* 81 Wn.2d 680, 504 P.2d 770 (1972), *overruled in part on other grounds by Timber Traders, Inc. v. Johnston*, 87 Wn.2d 42, 548 P.2d 1080 (1976). In *Timber Traders*, this Court held that "taxes are assessed against the owners of property," finding "the clearly expressed intent of RCW 84.40.020 to be that owners shall be liable."[3]

[3] The method of enforcing the collection of property taxes also compels this result. To enforce the payment of property taxes, the Department places a lien on the property. RCW 84.60.020. As this Court has held, it would be unconstitutional to foreclose a tax lien against property owned by someone other than the taxpayer. *State v. Lawton*, 25 Wn.2d 750, 764-65, 172 P.2d 465 (1946).

The Department's assessment of Flight Options for taxes on property owned by others violates this basic tenet of Washington tax law. The assessment was based on Flight Options' management of private jets on behalf of their more than 1,100 fractional owners. CP 36. Flight Options had no ownership interest at all in more than 60 of the jets for which it was assessed. CP 230-34. And while it had a residual interest in some jets that had not yet been fully resold to fractional owners, as the Department concedes (CP 103), Flight Options' cumulative ownership interests in all of the private jets assessed was less than 20%. CP 230-34. In any event, the assessments were issued without regard to Flight Options' ownership rather than "with reference to its ... ownership" as expressly required by RCW 84.40.020.

Ignoring the expressly broad applicability of RCW 84.40.020 to "***all*** personal property," Division II confined its analysis to Ch. 84.12 RCW, which addresses the valuation of public utility property. Even so, the opinion acknowledged that RCW 84.12.210 provides that "operating property used but not owned" by a public utility shall be assessed to "the owning company." Appx. 4a. Yet after noting that the statute "appears to support Flight Options' argument," the opinion summarily concludes that RCW 84.12.210 should be disregarded because it "***conflicts with*** the statutory definition of operating property." *Id.*

(emphasis added). Division II was "not persuade[d]" that the "legislature intended that only owned property could constitute operating property." *Id.*

In suggesting a perceived conflict between two related statutes, Division II's published opinion conflicts with this Court's long line of cases teaching that "it is the duty of the court to reconcile apparently conflicting statutes and to give effect to each of them." *State ex rel. Royal v. Board of Yakima County Comm'rs*, 123 Wn.2d 451, 459-460, 869 P.2d 56 (1994) *quoting Tommy P. v. Board of County Comm'rs of Spokane County*, 97 Wn.2d 385, 391-392, 645 P.2d 697 (1982). Furthermore, there is no actual conflict between RCW 84.12.210 and RCW 84.12.200(12) (defining operating property).

RCW 84.12.210 simply provides that even when property meeting the definition of "operating property" under RCW 84.12.200(12) is used by a person other than its owner, the property shall be assessed "to the owning company." Thus RCW 84.12.210 complements the command of RCW 84.40.020 that "***all*** personal property" shall be assessed "with reference to its ***ownership***" and does not conflict with the definition of operating property in RCW 84.12.200(12). *Waste Management of Seattle, Inc. v. Utilities and Transp. Com'n*, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994) ("[W]e will read statutes as complementary, rather than in conflict with each other.").

The harmony properly accorded these statutes is illustrated in *Canadian Pacific, supra,* where this Court held that property taxes on railroad cars *operated by* the Northern Pacific Railroad in Washington State were required to be assessed against the *owner* of the cars, Canadian Pacific. Rejecting the argument that "if this property is operating property, the tax" should be assessed against the company that "actually used and operated the cars within the state," 90 Wn. at 41, this Court held that the railcars were taxable "as operating railroad property ... to the true owner thereof." *Id.* at 46.

B. Division II's opinion conflicts with controlling Washington statutes and decisions of this Court regarding tax situs and, consequently, reaches an unconstitutional result.

In Washington, "[t]he law is well settled that tangible personal property is subject to taxation in the jurisdiction in which it has its actual situs." *U.S. Whaling Co. v. King County*, 96 Wn. 434, 436, 165 P. 70 (1917); *also* Wash. AGO 1929-30, pg. 179 ("Tangible personalty is taxable in this state at its situs.") This fundamental principle has been codified by statute. RCW 84.44.010 (personal property shall be assessed "in the county where it is situated").[4] Likewise RCW 84.12.200(12) limits the

4 "There is nearly universal agreement that personal property is 'situated' for tax purposes at its tax situs," *Mesa Leasing Ltd. v. City of Burlington*, 730 A.2d 1102, 1104 (Vt. 1999) (citations omitted); *Zantop Air Transp. v. San Bernadino County*, 246 Cal.App.2d 433, 437, 54 Cal.Rptr. 813 (1966) ("The word 'situated' . . . is synonymous with 'situs.'"); *J.H. Berra*

definition of utility operating property, in relevant part, to property that is "situate in Washington."

1. This Court's decisions require that tangible personal property have a permanent presence in Washington to acquire a tax situs here.

This Court has consistently held that a tax situs for tangible personal property requires a permanent presence in the taxing jurisdiction. *Guinness v. King County*, 32 Wn.2d 503, 507, 202 P.2d 737 (1949); *Town of Uniontown v. Klemgard*, 129 Wn. 144, 224 P. 610 (1924));.and *Canadian Pacific*, *supra*, 90 Wn. at 40.

In *Guinness*, this Court considered whether a yacht owned by a British citizen had acquired a tax situs in Washington. Holding that "in order to give a state jurisdiction over [tangible property] for the purpose of taxation, it must become incorporated into the personal property of that state, rather than being there temporarily only," 32 Wn.2d at 506, and applying the rule that "chattels merely temporarily or transiently within the limits of a state are not subject to its property taxes," 32 Wn.2d at 507 (*quoting* 51 Am. Jur. 468, Taxation § 453), *Guinness* stated the issue as "was the stay of the yacht temporary or had it acquired a more or less permanent location." 32 Wn.2d at 507.

Constr. v. Jefferson County Assessor, 2003 WL 1964029 (Mo. St. Tax Comm'n 2003) ("'Situated' is synonymous with 'situs' and denotes a more or less permanent location," *citing Buchanan County v. State Tax Comm'n*, 407 S.W.2d 910 (Mo. 1966)).

The distinction between temporary presence and a sufficiently permanent presence to create a tax situs was also considered by this Court in *Canadian Pacific, supra.* In that case, a Canadian company was assessed for Washington property taxes on railcars it owned that were used by another company to provide daily scheduled train service between British Columbia and Seattle. *Canadian Pacific* , 90 Wn. at 40. Identifying the issue as whether operation of the railcars at issue on a fixed route at regular schedules "gave the cars a situs ... in the state" 90 Wn. at 41, the Court concluded that the railcars had acquired a Washington tax situs because, under its contract with Northern Pacific, the Canadian railroad "has at all times substantially the same number of cars within the state." *Id.* at 44. *Canadian Pacific* reflects that in Washington, mobile personal property temporarily passing through the state establishes a sufficiently permanent presence to create a local tax situs through use on fixed routes and regular schedules.

Under this Court's decisions in *Guinness* and *Canadian Pacific*, the temporary, irregular and unscheduled presence within Washington of privately owned jets at the whim of their myriad fractional owners is not a permanent presence sufficient to create a Washington tax situs.[5]

[5] Since none of the fractionally owned jets have established a tax situs separate from their owner's domicile, any Washington resident who owns a

2. Division II's opinion conflicts with U.S. Supreme Court decisions requiring fixed routes and regular schedules for mobile property to acquire a local tax situs.

Instead of addressing the significant issues of Washington law that RCW 84.44.010, RCW 84.12.200(12), *Guinness*, and *Canadian Pacific* raise for determining whether mobile personal property only transiently present in the state has acquired a tax situs here, Division II's published opinion merely concluded that the assessment "is constitutional under both the Commerce Clause and the Due Process Clause" because it is "fairly apportione[d]." Appx. 5a. Division II's unexplained contention misidentifies the relevant constitutional principle. As the U.S. Supreme Court has explained, whether property "has tax situs in a state for the purpose of subjection to a property tax is one of due process" not the Commerce Clause. *Braniff Airways, supra*, 347 U.S. at 599.[6]

U.S. Supreme Court due process cases addressing whether mobile property owned by a non-domiciliary of the taxing state has acquired a local tax situs turn on whether the property entered the

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fractional interest in a jet managed by Flight Options is properly subject to property tax on its ownership interest by the County Assessor in the county where that owner resides. 84.40.040. The proper taxpayer for such assessment would be the fractional owner, not Flight Options. Any taxable ownership interests of Flight Options have their tax situs in Ohio, where the company is domiciled.

[6] The Commerce Clause requirement that taxes be "fairly apportioned" among taxing jurisdictions is only implicated when property has established multiple tax situses. *Braniff*, 347 U.S. at 602 ("the doctrine of tax apportionment" is "inapplicable" unless the property or a defined portion thereof is "permanently situated in a State other than the domiciliary State" thereby acquiring "a taxing situs elsewhere.").

state on fixed routes and regular schedules. Thus, in *Central Railroad Co. of Pennsylvania v. Pennsylvania*, 370 U.S. 607, 82 S. Ct. 1297, 8 L.Ed.2d 720 (1962) the Court held that 158 railcars owned by a Pennsylvania railroad but operated on "***fixed routes and regular schedules***" in New Jersey had obtained a local tax situs in New Jersey. 370 U.S. at 614. In contrast, the Court held that 1,507 other railcars owned by Central Railroad that were "regularly, habitually and/or continuously employed" outside Pennsylvania but "did ***not*** run on 'fixed rounds and regular schedules" had ***not*** acquired a tax situs outside Pennsylvania. *Id.*

In so ruling, the Court expressly reaffirmed the same principles that controlled its resolution of two tax situs cases involving airplanes owned by common carriers, *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 64 S. Ct. 950, 88 L.Ed. 1283 (1944) and *Braniff, supra*. In *Northwest*, the Court held that the sole tax situs of airplanes owned by Northwest was in Minnesota, its domicile. While the planes regularly left Minnesota and were "continuously engaged in flying from State to State" they had not established a "permanent location, i.e a taxing situs" in any other state. 322 U.S. at 295-96. By contrast, in *Braniff*, the Court held that a portion of Braniff's fleet had established a permanent presence, and therefore a tax situs in Nebraska, by "operating over ***fixed routes*** and landing on and departing from airports within Nebraska on ***fixed schedules,***" 347 U.S. at 591 (emphasis added).

In *Braniff*, the Court expressly confirmed that *Northwest Airlines* remains valid and reconciled the outcomes of the two cases by noting that the planes in *Northwest* had not acquired a local tax situs because they were not shown to have a permanent presence in a state other than the owner's domicile. *Id.* at 602. And in *Central Railroad*, the Court further explained that *Northwest* "reaffirmed the principle established by earlier cases that tangible property for which no tax situs has been established elsewhere may be taxed to its full by the owner's domicile" 370 U.S. at 612, while emphasizing that "[i]n *Braniff* the airplanes ... were shown by the record to have flown on fixed and regular routes." *Central Railroad,* 370 U.S. at 617.

Thus the result of Division II's published opinion, allowing a property tax to be assessed on planes that temporarily enter Washington on a sporadic basis without fixed routes or regular schedules, not only conflicts with controlling Washington statutes and decisions of this Court but is also unconstitutional.

C. Division II's opinion conflicts with statutes addressing taxable ownership and situs of utility operating property and disregards statutory language in the definition of "airplane company" in conflict with decisions of this Court.

The basic tenets of Washington property tax law discussed in Sections A and B above apply regardless of whether Flight Options is a public utility. Contrary to the unstated premise implicit in Division II's opinion, the procedures established in Ch.

84.12 RCW for valuing operating property owned by public utilities do not provide an independent basis for imposing tax on property that is not otherwise taxable. Thus as discussed above, RCW 84.12.210 provides that taxes on operating property are assessed to "the owning company" even when the property is used by a different company; a result confirmed by this Court in *Canadian Pacific*, 90 Wn. at 46 ("either as operating railroad property or as ordinary personal property" the railcars were required to be assessed "to the true owner thereof."). Likewise, RCW 84.12.200(12) limits the definition of "operating property," in relevant part, to property that is "situate in Washington" thereby requiring that operating property have a Washington tax situs, as does RCW 84.44.010, which provides that the "taxable situs" of personal property is "in the county where it is situated."

Moreover, Division II's unexplained contention that Flight Options is a public utility under Ch. 84.12 RCW simply "because the chapter clearly defines an airplane company as a public utility," Appx. at 4, disregarded and failed to give meaning to express statutory language limiting the definition of "airplane company" to persons "engaged in the business of transporting persons/and or property for compensation" RCW 84.12.200(3); the same error this Court recently addressed in *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 454-55, 210 P.3d 297 (2009) (statutory words "amounts derived from" must be accorded meaning).

As noted above, Flight Options is engaged in the business of selling private jets in fractional shares and in the business of managing fractionally owned jets on behalf of the jets' owners, activities for which Flight Options receives sales proceeds and management fees. Division II's published opinion attempts to sidestep the Department's contention that, contrary to the plain language of the controlling contracts, "the fractional ownership program is really a method of selling air transportation" (CP 104). This contention is contrary to this Court's decision in *Weyerhaeuser Co. v. Dep't of Revenue*, 106 Wn.2d 557, 565-66, 723 P.2d 1141 (1986) (Department has "no authority" to "impute" activity to a taxpayer contrary to the terms of the parties' contracts). In so doing, Division II's opinion also conflicts with this Court's decision in *Weyerhaeuser Timber Co. v. Henneford*, 185 Wn. 46, 51, 53 P.2d 38 (1936) holding that the Department's authority under Ch. 84.12 RCW is limited to central valuation of "quasi-public" carriers and does not extend to a private "logging railroad company." As in *Timber Co.*, Flight Options is not a common carrier and does not hold itself out to the public as such; it is a seller of fractional interests in private jets and manages private jets on behalf of their owners; it is not "engaged in the business of transporting persons and/or property for compensation." Although as discussed above, even if it were, it could only be assessed

property tax "by reference to its ... ownership" on property that had acquired a tax situs in Washington.

D. Division II's opinion conflicts with the decisions of this Court by construing tax statutes against the taxpayer.

Even if the applicable Washington property tax statutes were ambiguous, Division II's opinion conflicts with this Court's longstanding directive that ambiguous tax statutes must be "construed 'most strongly against the government and in favor of the taxpayer.'" *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 194, 201, 166 P.3d 667 (2007) (*quoting Estate of Hemphill v. Dep't of Revenue*, 153 Wn.2d 544, 552, 105 P.2d 391 (2005)). Thus if there were any ambiguity as to (1) whether RCW 84.40.020's command that "***all*** personal property" must be assessed "with reference to its ownership" really means "all"; (2) whether the command in RCW 84.12.210 that utility "operating property" be assessed to "the owning company" is consistent with (rather than in conflict with) RCW 84.40.020; (3) whether RCW 84.44.010 requires that personal property establish a permanent presence in Washington to acquires tax situs in the state; (4) whether RCW 84.12.200(12) confirms the tax situs requirement for public utility "operating property" (5) whether Flight Options is an "airplane company" as defined by RCW 84.12.200(3)[7]; and/or (6) whether Ch. 84.12

[7] In *Timber Co.*, 185 Wn. at 51, this Court specifically held that the rule that tax statutes are construed against the taxing authority applies to determining the Department's central assessment authority under Ch. 84.12 RCW. And in

RCW authorizes the Department of Revenue to assess tax against a manager of fractionally owned aircraft without regard to ownership or tax situs of the private jets, any such ambiguities were required by the decisions of this Court to be resolved in favor of Flight Options and against the Department.

VI. CONCLUSION

For the reasons set forth above, Petitioner Flight Options LLC respectfully requests that the Court accept review of the published opinion of the Court of Appeals, Division II.

RESPECTFULLY SUBMITTED this 11th day of February 2010.

PERKINS COIE LLP

By: _____
Scott M. Edwards, WSBA #26455

Attorneys for Petitioner,
Flight Options LLC

Foremost Dairies, Inc. v. Tax Comm'n, 75 Wn.2d 758, 763, 453 P.2d 870 (1969) this Court held that the rule applies "no less when interpreting facts in a case and concluding therefrom the applicability of a taxing statute."

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Review was hand delivered via messenger to:

Heidi Irvin
Brett Durbin
Washington Attorney General's Office
7141 Cleanwater Drive SW
Olympia, Washington

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 11th day of February, 2010.

Theresa A. Trotland

Theresa A. Trotland

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FLIGHT OPTIONS LLC, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Respondent.	No. 39517-7-II PUBLISHED OPINION

Houghton, J. — Flight Options LLC appeals the trial court's order granting summary judgment in favor of the Department of Revenue (DOR) on its tax assessment. Flight Options argues that DOR improperly assessed the tax against it because, among other reasons, it does not own the assessed property. We disagree and affirm.

FACTS

Flight Options sells fractional interests in jet aircraft that it manages, staffs, and operates from its principal place of business in Ohio. It owns residual interests in the aircraft, and the owners of the fractional interests cannot sell or transfer their shares without Flight Options' permission. After purchasing the aircraft, Flight Options divides them into fractional interests and sells each fraction for approximately $900,000.

Each fractional owner signs a management agreement, an owner's agreement, and a master interchange agreement. These contracts spell out the rights and obligations of all owners

regarding the aircraft fleet and other owners. An owner, depending on the size of the fractional share, is entitled to a specific number of flight hours at a fixed price per aircraft type. Once the owner exceeds the allotted flight hours, the owner may buy additional hours at an increased cost.

The fractional owner has no right to use consistently the owner's specific aircraft but agrees to use any available aircraft of the same type. Under the management agreement, Flight Options retains physical possession of the aircraft and remains responsible for all maintenance, insurance, scheduling, fueling, flight planning, and flight crews. All flight crews work for Flight Options.

Presently, Flight Options maintains a 20 percent aggregate ownership of its 202 jets. In 2004, Flight Options' aircraft made 1,397 takeoffs and landings in Washington. In 2005, Flight Options made 700 landings in Washington compared with 65,072 total landings for its fleet.

On June 8, 2005, DOR wrote Flight Options and requested that it complete an annual report required of a Washington state airplane company. After completing the report and submitting it as DOR requested, Flight Options moved for declaratory and injunctive relief in the superior court, arguing that DOR had wrongly assessed taxes. After discovery, both parties moved for summary judgment, and the trial court granted DOR's motion in a letter decision. Our Supreme Court declined to take review of Flight Options' appeal and transferred the matter to us.

ANALYSIS

Flight Options argues that DOR cannot assess tax against it under the state statutory scheme. Flight Options asserts that (1) it does not own the taxed property, (2) the property lacks a Washington situs, and (3) it is not an inter-county public utility.

Airplane Company Taxation

Chapter 84.12 RCW governs the assessment and taxation of public utilities. Under the statute, such utilities include railroads, airplane companies, electric light and power companies, gas companies, and others. RCW 84.12.200. Under RCW 84.12.200(3),

> "Airplane company" means and includes any person[1] owning, controlling, operating or managing real or personal property, used or to be used for or in connection with or to facilitate the conveyance and transportation of persons and/or property by aircraft, and engaged in the business of transporting persons and/or property for compensation, as owner, lessee or otherwise.

All of an airplane company's operating property must be assessed and taxed as personal property. RCW 84.12.280. Under RCW 84.12.200(12), taxable "operating property" includes all property a company owns or holds as an occupant, lessee, or otherwise. It specifically includes aircraft. Furthermore, the definition of "operating property" expressly provides that when property is used both inside and outside the state, the proportionate share on in-state use be considered "operating property." RCW 84.12.200(12).

Flight Options first argues that because it does not "own" the aircraft, and because DOR can only tax the owner, DOR invalidly assessed the tax. For support, it cites cases interpreting other chapters of Washington's tax code. In doing so, it ignores the statutory language of chapter 84.12 RCW, which, as we noted, expressly states that any person, owning, controlling or operating aircraft for compensation is an "airplane company" and that all aircraft owned, held as

[1] RCW 84.12.200(10) specifically provides that Flight Options is a person within the meaning of the statute because it is an "individual, firm, copartnership, joint venture, association, corporation, trust, or any other group acting as a unit, whether mutual, cooperative or otherwise, and/or trustees or receivers appointed by any court."

an occupant, leased, or otherwise constitutes "operating property." RCW 84.12.200(12). Flight Options retains possession of the aircraft and maintains full operational control. The aircraft are clearly Flight Options' "operating" property under the statutory scheme.

Flight Options also contends that its lack of ownership precludes imposition of the tax under RCW 84.12.210. That statute provides that the "[p]roperty used but not owned by an operating company shall, whether such use be exclusive or jointly with others, be deemed the sole operating property of the owning company." RCW 84.12.210.

Read in isolation, the statute appears to support Flight Options' argument. But we must read statutes in light of the statutory scheme as a whole. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). The language quoted from RCW 84.12.210 conflicts with the statutory definition of "operating property," which, as we noted, provides that operating property is any property owned or held by the taxpayer as occupant, lessee, or otherwise. RCW 84.12.200(12). And the statutory definition of "airplane company" includes any person owning, controlling, operating, or managing personal property used in transportation for compensation. RCW 84.12.200(3). Flight Options' argument does not persuade us because if the legislature intended that only owned personal property could constitute operating property, it would have so provided.

Flight Options next contends that it is not a "public utility" so it is not subject to chapter 84.12 RCW, entitled "Assessment and Taxation of Public Utilities." This argument lacks merit because the chapter clearly defines an airplane company as a public utility for property taxation purposes.[2]

Washington Situs of Property

Flight Options finally contends that DOR cannot tax an entity that lacks the requisite Washington situs under the Commerce Clause and the Due Process Clause. U.S. Const. art. I, § 8, cl. 3; U.S. Const. amend. XIV. DOR counters that Flight Options applies the wrong standard and that when a Washington court analyzes a challenge to the State's ability to impose taxes on property used in interstate commerce, it applies federal law and upholds the taxes so long as the State has fairly apportioned them.

When a state fairly apportions an assessment by looking to the value of use of that property within the state, the tax is constitutional under both the Commerce Clause and the Due Process Clause. *Braniff Airways, Inc. v. Nebraska State Bd. of Equalization & Assessment*, 347 U.S. 590, 598-600, 74 S. Ct. 757, 98 L. Ed. 967 (1954); *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174, 69 S. Ct. 432, 93 L. Ed. 585 (1949).

Here, under RCW 84.12.200(12), "personal property used partly within and partly without the state . . . includes a proportion of such personal property to be determined as in this chapter provided." This provision accords with the constitutional requirements for proportionate

[2] Flight Options' argument that the trial court erroneously based its decision on the incorrect assumption that this is a utility excise tax rather than a property tax also lacks merit. In its letter opinion, the trial court wrote that the issue was whether Flight Options was subject to a commercial utilities tax. The trial court clearly applied chapter 84.12 RCW, which describes a property tax. It did not base its decision on the wrong tax, despite its single misstatement.

taxation of property within interstate commerce. *Braniff*, 347 U.S. at 599-600; *Ott*, 336 U.S. at 174. Thus, Flight Options' argument fails.

Affirmed.

Houghton, J.

We concur:

Quinn-Brintnall, J.

Van Deren, C.J.